No. 17-1091

In The Supreme Court of the United States

TYSON TIMBS and
A 2012 LAND ROVER LR2,

Petitioners,

v.

STATE OF INDIANA,

Respondent.

On Petition For A Writ Of Certiorari To The Indiana Supreme Court

BRIEF OF *AMICI CURIAE* THE SOUTHERN POVERTY LAW CENTER AND THE CATO INSTITUTE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The Southern Poverty Law Center ("SPLC") has provided pro bono civil rights representation to low-income persons in the Southeast since 1971, with particular focus on combating unlawful discrimination and ending poverty. The SPLC provides educational materials, engages in policy reform, and develops litigation to minimize the burdens placed on the poor, to ensure meaningful access to social safety nets, and to enable upward mobility.

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. The Cato Institute's Project on Criminal Justice was founded in 1999, and focuses on the proper role of the criminal sanction in a free society, the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers.

The SPLC and the Cato Institute as *amici curiae* are concerned that local jurisdictions pursue civil and criminal fines, fees, and forfeitures at alarmingly high

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[1] All parties have consented to the filing of this brief. *Amici* affirm that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief. The parties were notified ten days prior to the due date of this brief of the intention to file.

rates. Faults in our criminal justice system demonstrate that the protections of the Eighth Amendment are urgently needed across America. The Indiana Supreme Court's failure to even analyze whether the Eighth Amendment's Excessive Fines Clause applies to the State of Indiana is deeply troubling, evidencing a dereliction of the court's duty to ensure the citizens of Indiana enjoy the protections granted them by federal law.

SUMMARY OF ARGUMENT

In the last three decades, there has been an unprecedented rise in fines, fees, and forfeitures imposed by state and federal criminal justice systems. The burgeoning emphasis on revenue generation to the exclusion of all else is transforming the landscape of the American criminal justice system – and not for the better. Unchecked fines, fees, and forfeitures increase poverty, crime, recidivism, and mass incarceration, ultimately costing the taxpayers and society much more than the revenue generated. Despite these societal costs, many law enforcement agencies and municipal entities see the benefit of revenues collected directly in their bottom line. This Court has recognized that when law enforcement can directly profit from revenues, constitutional safeguards must be at their zenith to protect against unconstitutional behavior. Yet the Indiana Supreme Court failed to even consider whether the Excessive Fines Clause provided such a safeguard for the citizens of Indiana. This Court should grant certiorari

to resolve the issue of incorporation of the Excessive Fines Clause and establish uniformity of judicial approach.

This brief proceeds in four parts. First, it details the unprecedented increase in civil and criminal fines, fees, and forfeitures in the last few decades. Second, this brief explains the distortion of criminal justice that results from such governmental self-dealing. Allowing unchecked fines, fees, and forfeitures undermines governmental aims of reducing poverty, crime, and mass incarceration. Third, this brief looks at how local governments' pursuit of fines, fees, and forfeitures distorts law enforcement priorities and incentivizes unconstitutional behavior by law enforcement and governmental entities. Lastly, this brief explains how the approach in the decision below abjectly failed to secure constitutional rights, causing great harm to the criminal justice system.

ARGUMENT

I. IN RECENT YEARS, AMERICAN CITIZENS HAVE FACED AN UNPRECEDENTED INCREASE IN CRIMINAL FINES, FEES, AND FORFEITURES.

In the United States today, 10 million people hold criminal debt amounting to over $50 billion.[2] In the

[2] Katherine D. Martin et al., *Shackled to Debt: Criminal Justice Financial Obligations and the Barriers to Re-entry They*

last three decades, there has been an unprecedented rise in fines, fees, and forfeitures imposed by state and federal criminal justice systems. This proliferation of criminal debt takes a number of forms, including fines and fees imposed at all stages of criminal proceedings, payment of restitution to victims,[3] and the use of "civil forfeitures," where the government seizes property even without a criminal conviction.[4] Just *federal* civil forfeitures have increased 4,667% between 1986 and 2014.[5] That enormous percentage is not a typographical error.

The number of individuals in the criminal justice system also has increased dramatically over the past few decades. "Between 1983 and 2001, incarceration (jail and prison) in the United States increased from 275 inmates per 100,000 to 686 inmates per 100,000. . . ."[6] The number of individuals on parole also swelled dramatically, jumping from 1.84 million people in 1980 to 6.47 million in 2000.[7]

Create, HARVARD KENNEDY SCHOOL & NAT'L INST. OF JUSTICE 3 (Jan. 2017).

[3] *Id.* at 4.

[4] Civil forfeiture is distinct from criminal forfeiture, which is imposed as part of criminal sentencing, *see Alexander v. United States*, 509 U.S. 544, 548 (1993), and also from forfeitures agreed to by a defendant as a part of a plea deal, *see, e.g.*, *Austin v. United States*, 509 U.S. 602, 604-05 (1993).

[5] Dick M. Carpenter II et al., *Policing for Profit: The Abuse of Civil Asset Forfeiture* 5 (2d ed. 2015).

[6] Martin, *supra*, at 3.

[7] Loic Wacquant, *Punishing the Poor: The Neoliberal Government of Social Insecurity* 133 (Duke Univ. Press 2009).

To obscure the cost of this burgeoning prison population, jurisdictions impose fines, fees, and forfeitures as a way to raise funds without visibly raising taxes. Studies show state criminal justice budgets (combined) increased from roughly $35 billion to $130 billion per year between 1982 and 1997.[8] To help pay for the dramatic growth of incarcerated and paroled individuals, and the judicial systems that charge such individuals, local governments impose fines at every step of criminal proceedings. For example, in Ferguson, Missouri, fines, fees, and forfeitures constituted more than 20% of the city's 2013 general revenue fund.[9]

Since 2010, 48 states have increased civil and criminal fees.[10] One report indicated that in 1991, 25% of prison inmates were assessed fines, but by 2004, that figure had risen to 66%.[11] The vast majority of incarcerated persons rack up tremendous debt due to fees imposed while they are in prison. In 2005, studies showed that 90% of those behind bars were charged fees for programs and services such as medical care, work release programs, and telephone use.[12] Eighty-five

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[8] *Id.* at 157.

[9] United States Dep't of Justice, Civil Rights Division, *Investigation of the Ferguson Police Department* 9 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf ("Ferguson Report").

[10] Joseph Shapiro, *Supreme Court Ruling Not Enough to Prevent Debtors Prisons*, NATIONAL PUBLIC RADIO (May 21, 2014).

[11] Alexes Harris, et al., *Drawing Blood from Stones: Legal Debt and Social Inequality in Contemporary United States*, 115 AM. J. SOCIOLOGY 1753, 1785-86 (2010).

[12] Martin, *supra*, at 5.

percent of people on probation and parole are also required to pay supervision fees, fines, and restitution if they want to remain free.[13] A recent study shows that families of the formerly incarcerated incur, on average, $13,607 for court-related fines and fees.[14] For the vast majority of formerly incarcerated persons who are low-income, this burden is impossible to overcome.

II. UNCHECKED FINES, FEES, AND FORFEITURES PERVERT CRIMINAL JUSTICE AIMS AND LEAD TO INCREASED SOCIETAL COSTS DUE TO INCREASES IN POVERTY, CRIME, AND MASS INCARCERATION.

Unchecked fines, fees, and forfeitures pervert the goals of criminal justice. First, this myopic focus on revenue generation causes law enforcement to "fail to consider, or even implement policies that directly conflict with, public-safety needs."[15] The Department of Justice's Ferguson Report profiles a poignant example of what happens when law enforcement becomes focused on revenue at the expense of public safety. That study demonstrated that focus on revenue generation resulted in unconstitutional and racially motivated behavior by law enforcement and municipal employees,

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[13] *Id.*

[14] Saneta deVuono-powell, *Who Pays? The True Cost of Incarceration on Families*, Ella Baker Center, Forward Together, Research Action Design 9 (Sept. 2015).

[15] Beth A. Colgan, "Fines, Fees, and Forfeitures" in Reforming Criminal Justice – Volume 4: Punishment, Incarceration, and Release 209 (Erik Luna ed. 2017) ("Colgan").

financial hardship for Ferguson's most vulnerable populations, and an erosion of public trust in municipal institutions and leadership.[16] Another study showed that allowing police to retain forfeited property "increased arrests related to drug activity compared to total arrests by nearly 20%."[17]

Second, the trend towards rising fines, fees, and forfeitures especially harms vulnerable populations who are living at or below the poverty line, and may actually *increase* poverty, crime, and mass incarceration. "By entrenching or exacerbating the financial vulnerability of people and their families, fines, fees, and forfeitures can create long-term instability and familial disruption, increase criminal justice involvement, aggravate jail overcrowding, and – perhaps ironically – decrease net revenue."[18]

For those without the ability to pay, fees and fines mean that even the most casual encounter with the criminal justice system can have catastrophic results. Those facing criminal debt must often choose between paying their debts and providing for basic needs like food and shelter.[19] Studies have linked increased fines to inability to pay child support or secure public housing, resulting in increased difficulties for low-inco[illegible]

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[16] *See generally* Ferguson Report.

[17] Colgan, *supra*, at 211.

[18] *Id.*

[19] Katherine Beckett & Alex Harris, *On Cash and Conviction: Monetary Sanctions as Misguided Policy*, 10 J. CRIMINOLOGY & PUB. POL'Y 509, 517 (2011).

families.[20] Criminal debt may also damage a debtor's credit rating, prevent a debtor from expunging criminal records, or cost a debtor professional or driver's licenses.[21] According to one study, 80% of those interviewed found their criminal debt obligations to be "unduly burdensome."[22]

The burgeoning business of fines, fees, and forfeitures also undermines rehabilitation by increasing recidivism. Unsurprisingly, people with unmanageable criminal debt are pressured into committing further crimes just to manage this burden.[23] Criminal debt can prevent access to public-sector employment and government-related private occupations,[24] and also prompt "additional warrants, liens, wage garnishments and tax rebate interception."[25] Again, unsurprisingly, the inability to secure stable housing or employment also makes re-offense more likely.

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[20] Rachel L. McLean & Michael D. Thompson, Council of State Gov't Justice Ctr., *Repaying Debts* 7-8 (2007).

[21] Colgan, *supra*, at 212.

[22] Harris, *supra*, at 1785-86.

[23] *Id.*; Faith E. Lutze et al., *Homelessness and Reentry: A Multisite Outcome Evaluation of Washington State's Reentry Housing Program for High Risk Offenders*, 41 Crim. Just. & Behav. 471 (2013).

[24] Jeff Manza and Christopher Uggen, *Locked Out: Felon Disenfranchisement and American Democracy* (Oxford Univ. Press 2006).

[25] Martin, *supra*, at 9.

Incarceration for inability to pay fines is unconstitutional under *Bearden v. Georgia*,[26] but it remains a common practice. In many states, debtors account for a quarter of jail populations.[27] Further incarceration can follow failure to pay criminal debt in a number of ways – those on probation may have probation revoked; criminal or civil offenses may result in incarceration for willful failure to pay; debtors may sometimes pay off debts by serving time in jail; and individuals may be arrested and jailed for missing a payment or not appearing at a hearing.[28] Or, as noted above, they may simply be denied employment and turn to crime to satisfy outstanding fines.

Debtors' prisons are no more effective or just now than they were in Dickensian England. Putting individuals in prison for inability to pay criminal debt is impractical and expensive, and disproportionately impacts low-income communities. The reality is that only a sliver of this nation's criminal debt is collected: for instance, of the $100 billion owed to the federal government in criminal debt, only about $4 billion per year is collected.[29] The proliferation of criminal debt is hurting society at large and costing the system much more than the revenue generated.

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[26] 461 U.S. 660, 661-62 (1983).

[27] Ferguson Report, n.12.

[28] Martin, *supra*, at 10.

[29] *Id.* at 5.

III. UNCHECKED FINES, FEES, AND FORFEITURES DISTORT LAW ENFORCEMENT PRIORITIES AND INCENTIVIZE UNCONSTITUTIONAL BEHAVIOR.

When law enforcement is driven primarily by revenue generation, policing practices will naturally give less attention to either promoting public safety or respecting constitutional rights. For example, unchecked civil forfeiture means that drug activity receives disproportionate attention relative to plausible public safety concerns – simply because that is where the cash is.[30] Likewise, ticketing revenue demonstrably upticks when city revenues decline.[31]

The scope of civil forfeiture untied to any criminal action is simply astounding. *The Washington Post* in 2014 reported that local law enforcement agencies participating in the Justice Department's Equitable Sharing Program retain up to 80% of seized assets.[32] Of

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[30] Colgan, *supra*, at 210-11. *See also* Brent D. Mast, Bruce L. Benson & David W. Rasmussen, *Entrepreneurial Police and Drug Enforcement Policy*, 104 PUB. CHOICE 284 (2000); John L. Worrall, *Addicted to the Drug War: The Role of Civil Asset Forfeiture as a Budgetary Necessity in Contemporary Law Enforcement*, 29 J. CRIM. JUST. 171 (2001).

[31] Colgan, *supra*, at 209-10. *See also* Thomas A. Garrett & Gary A. Wagner, *Red Ink in the Rearview Mirror: Local Fiscal Conditions and the Issuance of Traffic Tickets*, 52 J.L. & ECON. 71 (2009); Beth A. Colgan, *Lessons from Ferguson on Individual Defense Representation as a Tool for Systemic Reform*, 58 WM. & MARY L. REV. 1179 Part I.A. (2017).

[32] *See* Robert O'Hara, Jr. & Steven Rich, *Asset Seizures Fuel Police Spending*, WASH. POST (Oct. 11, 2014), http://www.washingtonpost.

nearly $2.5 billion self-reported monies collected and spent under the program, the *Post* calculated that 81% "came from cash and property seizures in which no indictment was filed."[33] The local law enforcement agencies used these funds for their own purposes without accountability to local budgeting procedures. For example, out of the nearly $3.4 million spent by the Oklahoma Highway Patrol under this program from July 2009 to June 2012, $1.9 million constituted unallowable and unsupported expenditures relating to salaries, overtime pay, construction, contractor fees, and the use of two Ford F-150 pickup trucks by non-law enforcement personnel.[34]

The Ferguson Report presents an especially disturbing case study of a criminal justice system distorted by an unchecked focus on revenue production. The Justice Department found that "[t]he City's emphasis on revenue generation has a profound effect on [the Ferguson Police Department's] approach to law enforcement" and produces "aggressive enforcement of Ferguson's municipal code, with insufficient thought given to whether enforcement strategies promote public safety or unnecessarily undermine community trust and cooperation."[35]

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com/sf/investigative/2014/10/11/asset-seizures-fuel-police-spending/?utm_term=.f5abfdc53077.

[33] *Id.*

[34] *Id.*

[35] Ferguson Report at 2.

Specifically, the report detailed the City's long-standing objective to increase "productivity" from municipal fines, to evaluate police officers based on their volume of traffic citations, to implement higher fines for high volume offenses, and to prioritize revenue generation in its justice system.[36] For example, the City prided itself for fining citizens up to $105 for "Weed/Tall Grass" violations of its code, when other municipalities charge only $5.[37] Police officers competed to see how many citations (i.e., fines) they could generate from one stop.[38] Bond forfeiture practices imposed undue hardships on individuals, including prolonged detentions and forfeitures, without any reduction of the outstanding fine.[39] The report concludes that all of these practices disproportionately impacted African Americans.

Despite the indignity this system wreaked on citizens, the City repeatedly disregarded concerns "about the impact its focus on revenue has had on lawful police action and the fair administration of justice in Ferguson."[40] The court's ability to optimize revenue generation had been the City's paramount concern. The report concluded by demonstrating in shameful detail how the unchecked focus on revenue generation

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[36] *Id.* at 9-14.

[37] *Id.* at 10.

[38] *Id.* at 11, 66.

[39] Ferguson Report at 58-62.

[40] *Id.* at 14.

resulted in chronic violations of individuals' rights under the First, Fourth, and Fourteenth Amendments.[41]

This Court has the opportunity to grant certiorari and offer guidance regarding the Excessive Fines Clause to ameliorate such perversions of local criminal justice systems. In many related contexts, this Court has recognized that the government's pecuniary interests can result in constitutional violations. In *Connally v. Georgia*, this Court struck down a warrant procedure where the justice of the peace received remuneration for every warrant issued.[42] In *Connally*, the Court relied on *Tumey v. Ohio*, in which the Court struck down a municipal fine system under which the village mayor had authority to impose fines and the village received a share of those fines.[43] In *Ward v. Village of Monroeville*, the Court invalidated a procedure by which sums produced by a mayor's court constituted a significant portion of municipal revenue.[44]

Similarly, in *Marshall v. Jericho*, a case challenging the return of certain civil fines to the Employment Standards Administration, the Court recognized that financial rewards can impugn prosecutorial discretion.[45] In *Bearden v. Georgia*, the Court considered whether

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[41] *Id.* at 15-78.

[42] 429 U.S. 245, 251 (1977).

[43] 273 U.S. 510, 532 (1927).

[44] 409 U.S. 57, 60 (1972) (explaining the situation offered a possible temptation to the average man "which might lead him not to hold the balance nice, clear and true between the State and the accused").

[45] 446 U.S. 238, 249-50 (1980).

probation may be revoked for failure to pay fines, and held that the Fourteenth Amendment prohibits revocation in cases where an inmate's failure to pay was not willful, but resulted from inability to pay.[46] In these cases, this Court rejected systems corrupted by the influence of pecuniary interests held by the judicial actors.

These previously articulated concerns support granting certiorari. Recent illustrations such as the *Ferguson Report* and findings by *The Washington Post* demonstrate that the concerns underpinning this jurisprudence have only increased. The Court's role in identifying and eliminating perverse incentives of government is sacrosanct and needed now more than ever.

IV. THE COURT SHOULD GRANT CERTIORARI TO PROVIDE A NECESSARY AND UNIFORM CONSTITUTIONAL SAFEGUARD AGAINST EXCESSIVE FINES.

In light of the threat that unchecked fines, fees, and forfeitures pose to American criminal justice, the application of the Excessive Fines Clause to the states is a pressing issue. Some state courts appear emboldened to use the absence of a decision from this Court to ignore the constitutional right against excessive fines and deny citizens an answer whether the Eighth Amendment protects them.

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[46] 461 U.S. 660, 672-73 (1983).

This Court should also grant review to clarify that state courts may not "opt" to refuse to evaluate the merits of a properly raised federal constitutional defense, and to decide on the merits whether the Eighth Amendment restricts a state court's ability to levy excessive fines. Mr. Timbs properly invoked the Excessive Fines Clause through the Fourteenth Amendment's Due Process Clause. Indiana's highest court declared it would not determine whether Mr. Timbs had such a right. The court "opted" not to decide.[47] The court articulated a desire to concern itself with rights arising under Indiana's laws.[48] This judicial punt is antithetical to a citizen's established right to assert a federal constitutional protection in state court.

Barring waiver or other like circumstances, any citizen who raises in a state court a federal constitutional right is entitled to a merits decision whether the right protects the citizen. "Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum – although both might well be true – but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state

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[47] Petitioners' App. at 8 (Opinion of the Supreme Court of the State of Indiana (Nov. 2, 2017)).

[48] *Id.* at 9 ("Indiana is a sovereign state within our federal system, and we elect not to impose federal obligations on the State that the federal government itself has not mandated. . . . [W]e decline to subject Indiana to a federal test that may operate to impede development of our own excessive-fines jurisprudence under the Indiana Constitution.").

legislature."[49] Thus, as the Court stated in *Howlett v. Rose*, "[a] state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of 'valid excuse.' "[50]

The absence of definitive law compels not abdication of judicial scrutiny, but its exercise. A state court ought not to rely on an absence of definitive authority from this Court or lower federal courts to reject a constitutional right. This Court cannot possibly hope to issue definitive decisions on every constitutional issue brought to state courts. The absence of a definitive decision compels that state courts such as Indiana examine the right on its merits according to the principles set forth by this Court in *Howlett*.

Precisely because this Court has not decided the issue of incorporation, the Indiana Supreme Court should have. When it refused to entertain Mr. Timbs's constitutional defense, the Indiana Supreme Court cited no authority permitting its abdication of its responsibility to apply federal law. Rather, its stated rationale to review only state law is invalid according to long-standing precedent such as *Howlett* and *Miles v. Illinois C.R. Co.* ("[T]he Federal Constitution makes the laws of the United States the supreme law of the land, binding on every citizen and every court and

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[49] *Howlett v. Rose*, 496 U.S. 356, 367 (1990).

[50] *Id.* at 370 (citing *Douglas v. New York, N. H. & H. R. Co.*, 279 U.S. 377, 387-88 (1929) (Holmes, J.)).

enforceable wherever jurisdiction is adequate for the purpose.").[51]

Similarly, in *McKnett v. St. Louis & S. F. R. Co.*, this Court held that a state court may not discriminate against rights arising under federal law.[52] In *McKnett*, the Alabama court had denied jurisdiction over a claim "based solely upon the [federal] source of law sought to be enforced."[53] This Court reversed the state court, stating that a plaintiff may not be "cast out because he is suing to enforce a federal act."[54] Similarly, Mr. Timbs's defense predicated on the Constitution may not be cast out because he raised it in state court. The approach of the Indiana Supreme Court represents a dereliction of judicial duty and contradicts the well-established reach of the Constitution.

As in Indiana, Montana's highest court has offered no justification for dismissing out of hand an assertion of rights under the Eighth Amendment's Excessive Fines Clause. In Montana, a defendant subject to forfeiture of his vehicle asserted the Eighth Amendment.[55] The Montana Supreme Court chastised the defendant for not asserting the Montana Constitution, and stated without any analysis that it "declined" to hold that the Eighth Amendment "is applicable in

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[51] 315 U.S. 698, 704 (1942).

[52] 292 U.S. 230 (1934).

[53] *Id.* at 234.

[54] *Id.*

[55] *State v. Forfeiture of 2003 Chevrolet Pickup*, 202 P.3d 782, 783 (Mont. 2009).

Montana, when the federal courts have not done so."[56] On this latter point, the Montana Supreme Court was wrong. Two federal circuits prior to 2009 had held that the Eighth Amendment applied to the states.[57] But regardless, in the absence of binding precedent to the contrary, state courts have an independent duty to interpret and enforce the Constitution.

Michigan's lower appellate courts have also ignored assertions of the Eighth Amendment, while analyzing the state equivalent using federal principles. In 1996, the Michigan Court of Appeals noted that the U.S. Supreme Court had never decided whether the Excessive Fines Clause of the Eighth Amendment applies to the states.[58] That court proceeded to analyze whether the fine was excessive under the state constitution, relying on federal case law to do so.[59] Subsequently, Michigan's appellate courts have followed this approach, deferring on the Excessive Fines Clause of the Eighth Amendment without valid excuse, but

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[56] *Id.*

[57] *See Qwest Corp. v. Minnesota Public Utilities Commission*, 427 F.3d 1061, 1069 (8th Cir. 2005) (Excessive Fines Clause applies to states); *Wright v. Riveland*, 219 F.3d 905, 914 (9th Cir. 2000) (same); *see also Broussard v. Par. of Orleans*, 318 F.3d 644, 652 (5th Cir. 2003) (assuming Excessive Fines Clause applies to states).

[58] *In re Forfeiture of $25,505*, 560 N.W.2d 341, 347 (Mich. Ct. App. 1996).

[59] *Id.*

employing the state equivalent and acknowledging its similarity to the federal protection.[60]

This Court has rejected as a valid excuse "[t]he fact that a state court derives its existence and functions from the state laws."[61] This Court held in *Second Employers' Liability Cases*, that such an excuse "is no reason why [a state court] should not afford relief" under federal law, reasoning that the state court "is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the state laws. The two together form one system of jurisprudence, which constitutes the law of the land for the State. . . ."[62]

This Court has thus rejected as a legitimate rationale that a state may confine its review to state law issues because the state funds the court system. "An excuse that is inconsistent with or violates federal law is not a valid excuse: the Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal

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[60] *See In re Forfeiture of 5118 Indian Garden Rd.*, 654 N.W.2d 646, 648-49 (Mich. Ct. App. 2002) ("These factors dovetail, to a certain extent, with the United States Supreme Court's statement in *United States v. Bajakajian*, 524 U.S. 321, 337 (1998). . . ."); *People v. Antolovich*, 525 N.W.2d 513, 515 (Mich. App. 1994) (declining to determine whether the fine violated the Eighth Amendment of the United States Constitution, but invalidating the fine as excessive under the state constitution).

[61] *Second Employers' Liability Cases*, 223 U.S. 1, 58 (1912).

[62] *Id.* at 58.

to recognize the superior authority of its source."[63] This case presents an infrequent yet serious rebellion against the jurisprudential system this Court recognized in *Second Employers' Liability Cases*. This Court should take review to enforce the holdings and rationales of *Second Employers' Liability Cases* and *Howlett*.

In "selective incorporation" and due process cases, this Court ordinarily reviews a lower court decision that undertook a legal analysis whether the asserted constitutional right applies.[64] Here, this Court has no analysis to review because the Indiana Supreme Court

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[63] *Howlett*, 496 U.S. at 371.

[64] *See, e.g.*, *Edwards v. South Carolina*, 372 U.S. 229, 238 (1963), *rev'g State v. Edwards*, 123 S.E.2d 247 (S.C. 1961) (holding that the breach of the peace was punishable and outside the scope of the defendants' assertion of constitutional rights under the Federal Constitution); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), *rev'g State v. Cantwell*, 8 A.2d 533 (Conn. 1939) (evaluating the challenged statute on the merits under the Establishment Clause asserted through the Fourteenth Amendment); *Palko v. Connecticut*, 302 U.S. 319, 329 (1937), *aff'g State v. Palko*, 191 A. 320 (Conn. 1937) ("As the claim of the accused raises questions as to rights secured under the provisions of the Constitution of the United States, we look to the decisions of the Supreme Court of the United States for guidance as to the proper construction of these provisions."), *rev'd on other grounds by Benton v. Maryland*, 395 U.S. 784 (1969); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937), *rev'g State v. De Jonge*, 51 P.2d 674 (Or. 1935) (performing a legal analysis regarding the federal right to assembly and distinguishing prior federal authorities to hold the statute constitutional); *Gitlow v. New York*, 268 U.S. 652, 666 (1925), *aff'g People v. Gitlow*, 195 A.D. 773 (N.Y. App. Div. 1921) (addressing on the merits application of freedom of speech and of the press guaranteed by the First Amendment under the Fourteenth Amendment to the challenged state statute).

refused to conduct one. In addition to the glaring error of leaving a properly raised constitutional right unresolved, this approach undermines the Court's review function, improperly forcing onto this Court a burden to grant certiorari or leave unaddressed a citizen's properly asserted constitutional defense.

No justification supports the state court's abdication of its responsibility to administer the laws not just of Indiana, but of the United States. This Court should grant certiorari in order to consider and reject the dismissive, unconstitutional methodology of the Indiana high court.

CONCLUSION

The Court should grant certiorari to resolve the issue of incorporation of the Excessive Fines Clause of the Eighth Amendment and establish uniformity of judicial approach. As discussed in detail above, the imposition of fees, fines, and forfeitures has risen dramatically in recent years, leading states across the country to permit aggressive policing practices of dubious constitutionality.

The Court has remarked that new criminal justice cases will assist the judiciary to expose "old infirmities which apathy or absence of challenge has permitted to stand."[66] The petition for certiorari offers this Court an opportunity to do just that by addressing infirmities

[66] *Williams v. Illinois*, 399 U.S. 235, 245 (1970).

with which this Court has yet to reckon. Guidance from this Court will improve the functioning of both state and federal courts and resolve an issue of tremendous significance to the criminal justice system.

The petition should be granted.

Respectfully submitted,

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